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JUNE 17 2009
COURT OF APPEALS
DIVISION TWO

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

NUBIAN A.-R.,)	
)	
Appellant,)	2 CA-JV 2008-0132
)	DEPARTMENT A
)	
v.)	<u>MEMORANDUM DECISION</u>
)	Not for Publication
ARIZONA DEPARTMENT OF)	Rule 28, Rules of Civil
ECONOMIC SECURITY and)	Appellate Procedure
PHYAR A.-R.,)	
)	
Appellees.)	
)	

APPEAL FROM THE SUPERIOR COURT OF COCHISE COUNTY

Cause No. JD200600069

Honorable Stephen M. Desens, Judge

AFFIRMED

Ronald Zack

Tucson
Attorney for Appellant

Terry Goddard, Arizona Attorney General
By Dawn R. Williams

Tucson
Attorneys for Appellee Arizona
Department of Economic Security

H O W A R D, Presiding Judge.

¶1 Nubian A.-R. appeals from the juvenile court’s termination of his parental rights to his daughter, Phyar A.-R., born in May 2005. As grounds for termination, the court found Nubian suffered from a disabling mental illness, *see* A.R.S. § 8-533(B)(3); had substantially neglected or willfully refused to remedy the circumstances causing Phyar to remain in a court-ordered, out-of-home placement for more than nine months, *see* § 8-533(B)(8)(a); and had failed to remedy those circumstances while Phyar had remained in foster care for more than fifteen months and was unlikely to be able to parent effectively in the near future, *see* § 8-533(B)(8)(c). Nubian contends there was insufficient evidence to support these grounds for termination or the court’s finding that termination was in Phyar’s best interests. He also argues the court abused its discretion in permitting the Arizona Department of Economic Security (ADES) to amend its motion for termination, in denying his motion to continue the termination hearing, and in proceeding with the hearing in his absence.

¶2 Because we find there was sufficient evidence for the juvenile court to terminate Nubian’s parental rights pursuant to § 8-533(B)(8)(a), we do not consider whether the evidence was also sufficient to establish grounds for termination under § 8-533(B)(3) or (B)(8)(c). *See Jesus M. v. Ariz. Dep’t of Econ. Sec.*, 203 Ariz. 278, ¶ 3, 53 P.3d 203, 205 (App. 2002) (“If clear and convincing evidence supports any one of the statutory grounds on which the juvenile court ordered severance, we need not address claims pertaining to the other grounds.”). For the same reason, we need not consider whether the court abused its

discretion in permitting ADES to amend its motion a month before the termination hearing to add an allegation that termination was warranted pursuant to § 8-533(B)(3).

Denial of Continuance

¶3 At the initial termination hearing, the juvenile court had scheduled a three-day contested adjudication hearing beginning July 29, 2008. In June, Nubian moved for a ninety-day postponement to permit newly assigned counsel to prepare for the hearing,¹ and the court rescheduled the hearing to begin on October 28. On October 23, Nubian's attorney filed a second motion to continue the hearing. He informed the court that Nubian had telephoned his office during the previous week and left word that he was driving to Georgia to arrange for more intensive care for his mother, who was ill and had recently fallen.² According to his attorney, Nubian had left the message that he would likely not return to Arizona until October 31 or later and so would be unable to attend a termination hearing that began on October 28. ADES objected to a continuance of the hearing, arguing Phyar's need for permanency had already been delayed beyond the time contemplated by federal and state statutes. ADES told the court that professional witnesses had been placed under subpoena and maintained that Nubian's motion, made less than a week before the scheduled hearing, required more documentation than a telephone message left for an attorney. The court denied

¹Although Nubian was represented by the Cochise County Public Defender throughout these proceedings, the deputy public defender who had been representing Nubian had become seriously ill in May, and the case had been reassigned to another member of that office.

²Counsel's motion initially identified the relative as Nubian's grandmother, but counsel later clarified that Nubian had left the state to arrange care for his mother.

Nubian's request and reaffirmed the hearing date. When Nubian did not appear in court on October 28, his attorney re-urged his motion to postpone the hearing. The court again denied the request, noting the lack of documentation and Phyar's interest in avoiding further delay.

¶4 Nubian argues the juvenile court abused its discretion in denying the continuance and proceeding in his absence without first having found he had "failed to appear at the termination adjudication hearing without good cause shown." Ariz. R. P. Juv. Ct. 66(D)(2). We review a trial court's order denying a motion to continue for an abuse of the court's discretion. *In re Maricopa County Superior Court No. MH2003-000240*, 206 Ariz. 367, ¶ 10, 78 P.3d 1088, 1090-91 (App. 2003). An "abuse of discretion" is "discretion manifestly unreasonable, or exercised on untenable grounds, or for untenable reasons." *Quigley v. City Court of Tucson*, 132 Ariz. 35, 37, 643 P.2d 738, 740 (App. 1982). We cannot say the court's decision to proceed with the hearing was untenable.

¶5 Although the court did not expressly find that Nubian had failed to establish good cause for his absence, it did state its "denial [of a continuance was] based on the fact that there was no documentation" to support Nubian's request. In deciding whether to proceed with a termination hearing in a parent's absence, the court must consider not only the interest of the parent in being present for the proceeding, but also the child, "whose best interests are at risk and require expedient consideration." *In re Pima County Juv. Action No. S-2462*, 162 Ariz. 536, 539, 785 P.2d 56, 59 (App. 1989). Rule 66(D)(2) thus authorizes the court to proceed with termination when a parent's failure to appear is "without good cause shown."

¶6 As ADES points out, counsel offered nothing more to explain Nubian's absence on the first day of the termination hearing than the assertions made in his motion to continue. Counsel failed to address ADES's suggestion that he at least obtain documentation of Nubian's out-of-state travel and of his mother's condition, as well as some explanation of why Nubian, who had the scheduled termination hearing to consider, was required to personally attend to these family matters during an extended out-of-state stay. Even if a parent's reason for nonappearance might have been sound, we see no abuse of discretion in a court's finding the parent failed to provide sufficient evidence establishing that reason. That is essentially what occurred here, where the court implicitly found Nubian had failed to make an adequate showing of good cause for his failure to appear.³

Sufficiency of Evidence to Support § 8-533(B)(8)(a) Grounds

¶7 Viewed in the light most favorable to sustaining the juvenile court's order, *Jesus M. v. Ariz. Dep't of Econ. Sec.*, 203 Ariz. 278, ¶ 13, 53 P.3d 203, 207 (App. 2002), the evidence establishes the following. In October 2006, the Child Protective Services (CPS) division of ADES took temporary custody of seventeen-month-old Phyar after her mother, Jessica O., had left Phyar with a babysitter in the morning and failed to return for her that

³Before ordering Nubian's rights terminated, the court conducted a full evidentiary hearing and, over his attorney's objection, admitted Nubian's previous testimony at the permanency hearing. Nubian was fully represented by counsel who challenged the state's evidence and presented evidence and argument on Nubian's behalf. Although Nubian asserts the juvenile court "deemed that [he] had admitted the allegations in the Motion for Termination by virtue of his failure to appear," the court's order states only that the court had admonished Nubian about this possible consequence. We find no evidence that the court relied on the allegations of ADES's motion. Instead, the court's order specifically refers to evidence presented during the two-day termination hearing and other evidence in the record.

night. Phyar was adjudicated dependent in March 2007 after Jessica admitted the allegations of an amended dependency petition, including that her substance abuse rendered her unable to parent Phyar, and after Nubian, who was in federal custody awaiting trial, admitted he was unable to parent Phyar because of his incarceration.⁴

¶8 Nubian had been arrested after a 2005 raid conducted by the Federal Bureau of Investigation on his home in Sierra Vista. Although federal charges were later dismissed, evidence at the termination hearing included a surveillance video described as depicting Nubian's involvement in drug trafficking and assault. When Nubian was released from custody in June 2007, he contacted Alma Estrada, the assigned CPS case manager. According to Estrada, Nubian requested visitation with Phyar but was unwilling to participate in reunification services or even to meet to discuss the case plan. Estrada reported Nubian had taken the position that the CPS case plan did not pertain to him and that Phyar should have been immediately placed in his custody.

¶9 In December 2007, on the first day of Phyar's permanency hearing, the juvenile court ordered Nubian to submit to a home study, a psychiatric evaluation, and drug testing. Later that month, Nubian submitted to a hair strand analysis and tested positive for cocaine. He refused the drug abuse assessment and treatment CPS offered him, however, insisting the test result had been wrong. He did not comply with random drug testing again until February 15, 2008, and for the next three weeks, his urinalysis results were negative. He also

⁴The juvenile court terminated Jessica's parental rights to Phyar in March 2008, and she did not appeal that decision

complied with random testing from May 28 through July 14, 2008, when test results were again negative. Other than those two periods of time, however, Nubian did not call or report for testing. He also refused to cooperate with a home study, asserting that a report recently prepared for a Pima County domestic relations court, to help determine custody arrangements for one of his other children, should suffice.

¶10 Nubian did complete an evaluation with psychologist Michael German, who diagnosed cocaine abuse and an antisocial personality disorder. German explained that antisocial personality disorder is characterized by “a willingness to exploit and take advantage of other people.” He opined that Nubian’s disorder affected most of his functioning, as evidenced by his criminal associations and pattern of degrading his female partners. German noted that persons with antisocial personality disorder have a higher risk for abusing or neglecting children because they “have a greater focus on their own personal needs” and “have a way of justifying their behavior even if it [negatively] affects other people,” including their children. German had concluded that, although Nubian may love his many children, his lifestyle, which appears to include trafficking in illegal drugs, keeping loaded guns in open areas, defrauding public assistance programs, and maintaining multiple sexual partners, renders him “ineligible to be a positive, responsible, and effective parent.” German opined that Nubian would be resistant to any treatment, as he saw no need to change his behavior. True to this prediction, Nubian refused to seek therapeutic services to address his personality disorder.

¶11 We agree with Nubian that, when considering whether a parent willfully refused or substantially neglected to remedy the circumstances causing his child to remain in an out-of-home placement, *see* § 8-533(B)(8)(a), the juvenile court must consider ““those circumstances existing at the time of the severance’ that prevent a parent from being able to appropriately provide for his or her children.” *Marina P. v. Ariz. Dep’t of Econ. Sec.*, 214 Ariz. 326, ¶ 22, 152 P.3d 1209, 1213 (App. 2007), *quoting In re Maricopa County Juv. Action No. JS-8441*, 175 Ariz. 463, 468, 857 P.2d 1317, 1322 (App. 1993), *abrogated on other grounds by Kent K. v. Bobby M.*, 210 Ariz. 279, ¶¶ 12, 41, 110 P.3d 1013, 1016, 1022 (2005). Moreover, this ground for termination requires the court to “focus[] on the level of the parent’s effort to cure the circumstances rather than the parent’s success in actually doing so.” *Id.* ¶ 20.

¶12 But the juvenile court was not required to conclude, as Nubian suggests, that his release from custody, in and of itself, remedied the circumstances that caused Phyar to remain in out-of-home care. Nor was the court required to find Nubian’s “strong and dedicated record of visitations with Phyar” reflected sufficient effort to remedy those circumstances, particularly in light of Nubian’s failure to engage in services, his refusal to consider lifestyle changes to protect Phyar, and his refusal to even permit examination of the home life he intended to provide for her. Nubian appears to complain that ADES relies on circumstances leading to his incarceration and Phyar’s subsequent removal to establish his inability to parent her effectively at the time of the severance hearing. But, his refusal to participate in a home study or to provide evidence of a current, legal source of income belies

his objection.⁵ Substantial evidence supports the court’s conclusion that Nubian had willfully refused or substantially neglected to remedy the circumstances causing Phyar’s lengthy out-of-home placement, thus warranting termination of his parental rights pursuant to § 8-533(B)(8)(a), and we will not disturb that ruling. *See Lashonda M. v. Ariz. Dep’t of Econ. Sec.*, 210 Ariz. 77, ¶ 13, 107 P.3d 923, 927 (App. 2005).

Best Interests

¶13 We also find reasonable evidence supported the juvenile court’s conclusion that terminating Nubian’s parental rights to Phyar was in her best interests. This conclusion required a finding, based on a preponderance of the evidence, that Phyar “would derive an affirmative benefit from termination or incur a detriment by continuing in the relationship.” *Ariz. Dep’t of Econ. Sec. v. Oscar O.*, 209 Ariz. 332, ¶ 6, 100 P.3d 943, 945 (App. 2004). “The existence of a current adoptive plan is one well-recognized example of such a benefit” of termination. *Id.* The state presented evidence that Phyar has bonded with her foster parents and that they are willing to adopt her.

⁵Nubian argues, as he did below, that a home study was unnecessary because he had already participated in an evaluation during a Pima County custody proceeding. But, as had been explained to him, the study requested by ADES served different purposes and involved different inquiries. Similarly, although Nubian argues his lack of a legal income is irrelevant because he “testified to essentially being a stay-at-home dad,” as German testified, “if he has no legal source of income, it would appear that he is likely to have an illegal source of income.” The state’s evidence, through financial records and the testimony of law enforcement officers, provided substantial support for that conclusion.

Conclusion

¶14 We conclude the juvenile court did not abuse its discretion in denying Nubian's motion for a continuance or in proceeding with the termination adjudication hearing in his absence. We further find substantial evidence supports the court's order regarding termination under § 8-533(B)(8)(a). We therefore affirm. *See Lashonda M.*, 210 Ariz. ¶¶ 13, 19, 107 P.3d at 928-29.

JOSEPH W. HOWARD, Presiding Judge

CONCURRING:

JOHN PELANDER, Chief Judge

PHILIP G. ESPINOSA, Judge